



November 7, 2002

Mr. Gordon Bowman  
Assistant County Attorney  
Travis County  
P.O. Box 1748  
Austin, Texas 78767

OR2002-6357

Dear Mr. Bowman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 171883.

The Travis County Sheriff's Office (the "sheriff") received a request for information relating to Internal Affairs Case No. 01-119. You state that the sheriff has released some of the requested information. The sheriff claims that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.<sup>1</sup>

We first note that chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Likewise, a governmental body need not release information if the governmental body did not hold or have access to the information when it received the request. *See* Open Records Decision Nos. 558 at 2 (1990), 445 at 2 (1986). In this instance, the sheriff did not hold or have access to one of the submitted documents when the sheriff

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<sup>1</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the sheriff to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

received this request for information. That document, which we have marked, need not be released.

Next, we address the sheriff's claims under section 552.108 of the Government Code. The sheriff asserts that the requested information is excepted from disclosure under section 552.108(b)(2). Section 552.108(b)(2) is applicable to "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution . . . if . . . the internal record or notation relates to law enforcement only in relation to an investigation that did not result in conviction or deferred adjudication[.]" A governmental body that raises section 552.108 must reasonably explain, if the requested information does not supply an explanation on its face, how and why section 552.108 applies to the information. See Gov't Code § 552.301(e)(1)(A); *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

You state that the requested information relates to internal affairs investigations of excessive force and officer misconduct. We note that section 552.108 is generally not applicable either to the personnel records of law enforcement officers or to information relating to complaints involving law enforcement officers. See *City of Fort Worth v. Cornyn*, \_\_\_ S.W.3d \_\_\_, 2002 WL 31026981 (Tex. App. – Austin 2002, no pet. h.); Open Records Decision No. 562 at 10 (1990). Furthermore, section 552.108 does not encompass information relating to an administrative internal affairs investigation that did not result in a criminal investigation or prosecution. See *Morales v. Ellen*, 840 S.W.2d 519, 525-26 (Tex. Civ. App.--El Paso 1992, writ denied) (statutory predecessor not applicable to internal investigation that did not result in criminal investigation or prosecution). You state that the excessive force investigation did not result in any criminal charges. You do not inform us that the officer misconduct investigation has resulted in any criminal charges. Additionally, we note that witnesses received "Garrity Warnings" that neither their statements nor any information or evidence gained by reason of their statements could be used against them by the sheriff in any subsequent criminal proceeding. See *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967). We therefore conclude that the sheriff has not demonstrated that information relating to the excessive force and officer misconduct investigations is excepted from disclosure under section 552.108.

The sheriff also seeks to withhold the names and statements of witnesses in the excessive force investigation under section 552.108. However, as the sheriff has not demonstrated that section 552.108 is applicable to the information that pertains to that investigation, the sheriff may not withhold witness information that relates to that investigation under section 552.108. See *Morales v. Ellen*, 840 S.W.2d at 526 (trial court erred in concluding that statutory predecessor was applicable to information relating to internal affairs investigation of alleged sexual harassment and other misconduct).

The sheriff also claims that information relating to the officer misconduct investigation is excepted from disclosure under section 552.103. This exception provides in part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that the officer misconduct investigation is in the administrative appeals process and that litigation is reasonably anticipated. You have not demonstrated, however, that the administrative appeals process constitutes litigation for purposes of section 552.103. *See*

Open Records Decision No. 588 (1991). Furthermore, you have not otherwise established that the sheriff anticipates litigation with regard to the officer misconduct investigation. *See* Open Records Decision Nos. 452 at 4 (1986) (section 552.103 requires concrete evidence showing that claim that litigation may ensue is more than mere conjecture), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger section 552.103). Therefore, the sheriff may not withhold information that relates to the officer misconduct investigation under section 552.103.

The sheriff also raises section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that other statutes make confidential. The sheriff claims that the submitted investigative records contain confidential criminal history record information ("CHRI"). CHRI generated by the National Crime Information Center ("NCIC") or the Texas Crime Information Center ("TCIC") is confidential. Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI that states obtain from the federal government or other states. *See* Open Records Decision No. 565 (1990). The federal regulations allow each state to follow its individual law with respect to CHRI that it generates. *Id.* Section 411.083 of the Government Code deems confidential CHRI that the Department of Public Safety ("DPS") maintains, except that the DPS may disseminate this information as provided in subchapter F of chapter 411 of the Government Code. *See* Gov't Code § 411.083.<sup>2</sup>

Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI from DPS. A criminal justice agency that is authorized to obtain CHRI from DPS also may obtain CHRI that is maintained by another criminal justice agency from that criminal justice agency. *Id.* § 411.087(a)(2). However, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1).

Thus, any CHRI obtained from DPS or another criminal justice agency is confidential under subchapter F of chapter 411 of the Government Code. In this instance, the submitted information includes CHRI generated by another criminal justice agency. The sheriff appears to have obtained this CHRI from that criminal justice agency. The sheriff must withhold the CHRI, which we have marked, under section 552.101 of the Government Code.

The sheriff also raises section 552.101 in conjunction with the common-law right to privacy. Information must be withheld under section 552.101 in conjunction with common-law privacy if the information is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public

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<sup>2</sup>Section 411.082(2) of the Government Code defines criminal history record information as "information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions."

interest. See *Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). Common-law privacy protects the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. See 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. See Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to a drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

The sheriff asserts that some of the submitted information is private under section 552.101. We note that this information relates almost exclusively to the official conduct of public employees. The public has a legitimate interest in such information. See Open Records Decision Nos. 470 at 4 (1987) (public employee's job performance does not generally constitute that individual's private affairs), 444 at 3 (1986) (public has obvious interest in information concerning qualifications and performance of governmental employees, particularly those involved in law enforcement). We conclude that none of the remaining information is excepted from disclosure under section 552.101 in conjunction with common-law privacy.

We note, however, that the sheriff must withhold some of the remaining information under section 552.117 of the Government Code. Section 552.117(2) excepts from disclosure the home address, home telephone number, and social security number of a peace officer, as defined by article 2.12 of the Code of Criminal Procedure, as well as information that reveals whether the peace officer has family members, regardless of whether the peace officer has complied with sections 552.024 or 552.1175. We have marked a small amount of information that the sheriff must withhold under section 552.117(2).

The sheriff also raises section 552.130 of the Government Code. Section 552.130 excepts from disclosure information that relates to

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state;
- (2) a motor vehicle title or registration issued by an agency of this state; or
- (3) a personal identification document issued by an agency of this state or a local agency authorized to issue an identification document.

Gov't Code § 552.130. The sheriff has not demonstrated that any of the remaining information is excepted from disclosure under section 552.130.

In summary, one of the submitted documents need not be released, as the sheriff did not hold or have access to that document when she received this request for information. The sheriff must withhold the marked criminal history record information under section 552.101 of the Government Code in conjunction with subchapter F of chapter 411 of the Government Code. The sheriff also must withhold the marked information that relates to peace officers under section 552.117(2). The rest of the requested information must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

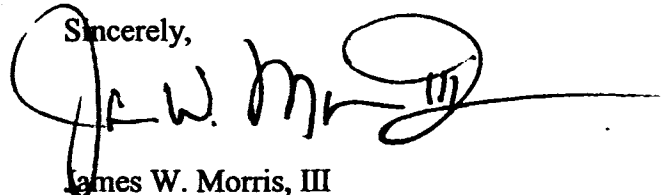
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/seg

Ref: ID# 171883

Enc: Marked documents

c: Ms. Kim Moore  
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(w/o enclosures)